

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL  
**RECEIVED**

APR 6 - 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Policies and Rules for the ) IB Docket No. 98-21  
Direct Broadcast Satellite Service )  
 )

**COMMENTS OF THE STATE OF HAWAII**

The State of Hawaii (the "State")<sup>1</sup> hereby submits comments in response to the Notice of Proposed Rulemaking (the "Notice") which the Commission issued in the above-captioned docket.<sup>2</sup> The State wholeheartedly welcomes the Commission's Notice and appreciates the Commission's interest in making direct broadcast satellite ("DBS") service available to Hawaii and Alaska residents as soon as possible. In particular, the State strongly supports the thrust of paragraphs 32-36 of the Notice, in which the Commission clarifies the geographic service requirements of current Section 100.53 of its rules (proposed to be renumbered Section 25.146(d)).

**I. INTRODUCTION**

Section 100.53 of the Commission's rules was adopted in 1995 in order to expedite the provision of DBS service to Alaska and Hawaii.<sup>3</sup> However, more than two years after adoption, the residents of the State of Hawaii still do not have access to DBS services, in stark contrast to the

---

<sup>1</sup> These comments are submitted by the State of Hawaii through its Department of Commerce and Consumer Affairs. A division of the Department -- the Cable Television Division -- is the State's cable franchise administrator.

<sup>2</sup> Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 98-21, FCC 98-26 (released Feb. 26, 1998) ("Notice").

<sup>3</sup> 47 C.F.R. § 100.53.

No. of Copies rec'd 089  
List ABCDE

continental United States ("CONUS"), where at least five companies currently provide some type of DBS or Direct-to-the-Home ("DTH") service.<sup>4</sup> The State looks forward to obtaining this important service which offers additional programming choices, as well as a promising means for the delivery of a wide variety of other specialized services (e.g., Internet access).<sup>5</sup> In addition, DBS would provide badly-needed competition to Hawaii's terrestrial cable telecommunications systems, which is especially important for Hawaii because Hawaii's mountainous topography makes line-of-sight reception of over-the-air broadcast signals difficult (thus currently leaving cable as the sole source of video programming for many Hawaiian residents).<sup>6</sup> Furthermore, Hawaii's non-contiguous island structure makes access to land-based distribution systems of video programming problematic for some residents.

The residents of Hawaii and Alaska have waited long enough to receive competitive alternatives to the incumbent cable operator. In order to ensure that Hawaii and Alaska receive

---

<sup>4</sup> The State may receive some type of DBS service from EchoStar and Tempo by the end of 1998. However, whether these carriers will actually initiate service remains uncertain, as does the scope of programming, if any, that would eventually be provided. These uncertainties demonstrate that problems still exist with the current regulatory mechanism (e.g., Section 100.53) even assuming that Hawaii receives some type of DBS service this year.

<sup>5</sup> See Annual Assessment of the Status of Competition in markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141, FCC 97-423 (released Jan. 13, 1998) at ¶ 56 ("DBS services offer many features which consumers rate highly, such as digital picture quality, compact disk sound clarity, increased channel capacity, near video on demand ('NVOD') movies and other interactive programming and data services.").

<sup>6</sup> See Notice at ¶ 33 ("We believe that provision of [DBS] service to Alaska and Hawaii will provide important MVPD competition in these markets.").

competing multichannel video programming distributors (“MVPDs”) expeditiously, the Commission should modify Section 100.53<sup>7</sup> as follows:

1. Expand the scope of the geographic service obligations beyond DBS operators to include other forms of MVPD satellite providers, including those that operate either geostationary-satellite orbit (“GSO”) satellites in the Ka-band or foreign satellites in the DBS band;
2. Clarify that Section 100.53(b) applies to DBS licensees<sup>8</sup> who were granted their authorizations prior to January 19, 1996 and who: (a) request extensions of time; (b) request license renewals; or (c) replace any satellite;
3. Do not delete Section 100.53(a), but instead clarify that Section 100.53(a) requires DBS licensees to provide full DBS service to Hawaii and Alaska from their western orbital slots by the end of their western orbital slot milestones or else forfeit their western orbital slots;
4. Adopt an “offshore states” policy that requires that DBS licensees provide full DBS service to Hawaii and Alaska before they are eligible to provide service from any eastern orbital channel beyond their existing assignments; and
5. Clarify that the “full” DBS service required by Section 100.53’s geographic service obligation means that Hawaii and Alaska subscribers are entitled to receive DBS programming that is of equal value with that offered to subscribers in the continental United States (“CONUS”), and at equivalent prices.

## **II. THE SCOPE OF SECTION 100.53’S GEOGRAPHIC SERVICE REQUIREMENTS SHOULD APPLY TO FOREIGN DBS PROVIDERS AND TO ALL PROVIDERS OF GSO SATELLITES IN THE Ka-BAND**

The U.S. has begun to authorize the use of foreign orbital slots to provide DBS programming to U.S. residents. In April 1996, the U.S. reached an agreement with Mexico to permit DBS and DTH-FSS satellites licensed by either country to provide service into each other’s

---

<sup>7</sup> For purposes of these comments, all references to Section 100.53 are interchangeable with references to the proposed new Section 25.146(d).

<sup>8</sup> Given the State’s Recommendation #1, all following references to “DBS” are meant to include all MVPD satellite providers offering DTH services to the public.

territory.<sup>9</sup> Other agreements with additional countries are expected soon. If these foreign satellites are not covered by Section 100.53, DBS service to Hawaii will be further undermined because the U.S. market can economically support only a limited number of DBS providers. If foreign satellites are permitted to provide DBS service to the CONUS without simultaneously serving Hawaii, the mainland U.S. market could become saturated and no room would be left for those providers that are willing and able to serve Hawaii. If DBS providers want to uplink DBS programming to foreign satellites for consumption in the U.S., they should abide by the Commission's Section 100.53 rules designed to promote truly nationwide availability of DBS service. Any other result would be inequitable to the citizens of Hawaii and would undermine the Commission's Section 1 mandate.<sup>10</sup> Applying Section 100.53 to foreign DBS providers would treat foreign providers exactly the same as U.S. providers and would thus ensure consistent national treatment.

Section 100.53 should also apply to new DTH services in the Ka-band. In October 1997, the Commission adopted licensing and service rules for a new generation of fixed-satellite service ("FSS") systems in the Ka-band.<sup>11</sup> As the Commission stated:

---

<sup>9</sup> See Notice at ¶ 11 n.36; "Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States" (Apr. 28, 1996); Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States and the United Mexican States, Public Notice, DA 96-1880, Rpt. No. SPB-65 (Nov. 13, 1996).

<sup>10</sup> 47 U.S.C. § 151.

<sup>11</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 -30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Report and Order, CC Docket No. 92-297, FCC 97-378 (released Oct. 15, 1997) ("Ka-band Order").

“The satellite systems that will operate in this band represent a new age in satellite communications. These systems have the potential to provide a wide variety of broadband interactive digital services in the United States and around the world including: voice, data, and video; videoconferencing; facsimile; computer access and telemedicine. The systems can provide direct-to-home services, potentially allowing customers to participate in activities from distance learning to interactive home shopping. . . . These systems also represent an opportunity for the United States to continue its leadership role in promoting global development through enhanced communication infrastructures and services. They also represent a major step in achieving a seamless information infrastructure.”<sup>12</sup>

In the Ka-band Order, the Commission declared that “it serves the public interest to adopt a coverage area requirement” for 28 GHz NGSO FSS systems.<sup>13</sup> In particular, the Commission required these NGSO satellites to provide FSS on a continuous basis throughout the fifty states, Puerto Rico, and the U.S. Virgin Islands.

Unfortunately, the Commission did not adopt a similar coverage area requirement for GSO systems operating in the Ka-band. The Commission should use the current proceeding to correct this oversight and require that all GSO systems operating in the Ka-band be required to serve Hawaii and Alaska. Hawaii’s citizens should receive, indeed they expect to receive, multi-channel video programming and other broadband communications services via each of the major delivery systems available in the CONUS – including DBS, Ka-band, and other DTH services. Given its remote location, it is critical that Hawaii residents be included in the “seamless information infrastructure” that the Ka-band promises to deliver.<sup>14</sup>

---

<sup>12</sup> Id. at ¶¶ 1-2.

<sup>13</sup> Id. at ¶ 34.

<sup>14</sup> The feasibility of serving Hawaii from many orbital locations assigned to Ka-band satellites is unquestioned. In October 1997, Capitol Broadcasting Company, Inc. testified before Congress that it

**III. SECTION 100.53(b) APPLIES TO ALL SATELLITES REPLACED BY DBS LICENSEES WHO WERE GRANTED THEIR AUTHORIZATIONS PRIOR TO JANUARY 19, 1996**

In the Notice, the Commission clarifies that Section 100.53(b) does not apply only to DBS providers awarded licenses after January 19, 1996, but also applies to DBS providers awarded licenses prior to January 19, 1996. Specifically, the Commission clarifies that DBS providers awarded licenses prior to January 19, 1996 are subject to Section 100.53(b) if they seek: (1) extensions of time; or (2) license renewals.<sup>15</sup> While the State wholeheartedly agrees with this clarification, the Commission should also clarify that Section 100.53(b) applies to all DBS providers that seek to replace one of their satellites. All newer satellites clearly can be technically capable of serving Hawaii and DBS providers should be required to utilize such satellites in any replacement activity.

**IV. THE COMMISSION SHOULD CLARIFY THAT SECTION 100.53(a) REQUIRES DBS OPERATORS TO PROVIDE FULL DBS SERVICE TO HAWAII AND ALASKA BY THE END OF THEIR WESTERN ORBITAL SLOT MILESTONES**

In the Notice, the Commission recommends deleting Section 100.53(a) in its entirety because it could mistakenly be interpreted as allowing DBS operators to warehouse western orbital channels for up to 16 years.<sup>16</sup> The State agrees with the Commission that such an interpretation is unreasonable given the purpose behind Section 100.53, which is to expedite DBS

---

will operate a satellite in the Ka-band with 61 spotbeams that will cover the CONUS, Alaska and Hawaii. Capitol intends to offer a local station package of all over-the-air, full power, commercial television stations within a given station's designated market area. See Notice at ¶ 58; Statement of Capitol Broadcasting Company, Inc. before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, U.S., House of Representatives, Hearing on the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals License (Oct. 30, 1997).

<sup>15</sup> Notice at ¶ 33.

<sup>16</sup> Id. at ¶ 36.

service to Hawaii. However, because Section 100.53 has not yet produced its expected goal (i.e., DBS service to Hawaii and Alaska), an elimination of the Section 100.53(a) mandate is, at best, premature. A better approach would be to clarify that Section 100.53(a) requires DBS providers to provide service to Hawaii and Alaska from their western orbital slots by the end of their six-year western orbital slot milestones, or else forfeit their western channels.<sup>17</sup>

Section 100.53(a) should not be deleted in its entirety because, properly interpreted, it provides additional pressure on DBS operators to serve Hawaii and Alaska. The Commission states that deleting Section 100.53(a) would revert DBS operators back to Section 100.19, which requires that a DBS operator put its western channels “into service” by the expiration of its six-year western orbital milestone. Relying solely on Section 100.19 is insufficient because the term “in operation” does not necessitate service to Hawaii. Section 100.53(a) was intended to supplement Section 100.19 by requiring that western channels not simply be put into operation within six years, but also serve Hawaii and Alaska within six years. If Section 100.53(a) were deleted, a DBS operator could satisfy its six-year milestone obligation by putting a satellite into service in a western orbital slot, pointing the satellite directly at Japan, and transmitting 100 percent Japanese language programming. To prevent such misuse of its western channels, the Commission should maintain Section 100.53(a), but clarify the language to read as follows:

Those holding DBS channel assignments in a western orbital slot (i.e., 148° W.L., 157° W.L., 166° W.L., or 175° W.L.) as of January 19, 1996 must provide DBS service to Alaska and Hawaii from those channels before the end of their due diligence requirements, as set forth in Section 100.19, or else relinquish those channel assignments. Such DBS service to Alaska and

---

<sup>17</sup> See 47 C.F.R. § 100.19 (requires that a DBS satellite be placed into operation within six years of the construction permit grant).

Hawaii must be of equal value and at equal prices to the service offered to subscribers in the Continental United States.

**V. THE COMMISSION SHOULD ADOPT AN “OFFSHORE STATES” POLICY**

In the Notice, the Commission seeks comment on the State’s proposal for an “offshore states” policy. This policy will require licensees of DBS channels at eastern orbital slots to demonstrate that they have provided service to Hawaii and Alaska before they would be eligible to provide service from any eastern DBS channel assignment beyond their existing assignments.<sup>18</sup> The State strongly supports the establishment of such a policy for similar reasons a policy regarding foreign satellites is needed. To wit, the U.S. market can economically support only a limited number of DBS satellites. If DBS providers are permitted to add additional DBS satellites from orbital slots technically incapable of serving Hawaii, the mainland U.S. market could become saturated and no incentive would be left to launch satellites from orbital slots capable of serving Hawaii.

To the extent that it is technically feasible to serve Hawaii and Alaska from eastern orbital slots, DBS providers should be required to do so because it will help assure that “core-CONUS” programming reaches these remote points. From Hawaii’s perspective, satisfying the geographic service requirement from western orbital slots may be less desirable because DBS providers may resist transmitting duplicative “core-CONUS” programming from those slots. Thus, the Commission should ensure that every effort is made to satisfy the geographic service requirements from the eastern orbital slots.

---

<sup>18</sup> Notice at ¶ 34. Footnote 80 of the Notice cites to a letter sent from the State’s FCC counsel to Chris Murphy of the Satellite Policy Branch in advance of the Commission’s April 25, 1997 roundtable on DBS (DA 97-616, Rpt. No. IN 97-8). For the sake of precision, the letter was dated April 21, 1997, not April 23, 1997, and was signed by Herbert Marks, not David Nall.



## **VI. THE COMMISSION SHOULD CLARIFY THAT “FULL” DBS SERVICE MEANS PROGRAMMING OF EQUAL VALUE**

Section 100.53 requires that DBS service to Alaska and Hawaii be at least equivalent to that provided to the CONUS. In its order adopting Section 100.53, the Commission stated that the obligation to serve Alaska and Hawaii involves “full service.”<sup>19</sup> Although it has been argued that the term “full” refers only to power levels, such a limited interpretation of the term “full” would eviscerate the geographic service requirement and defeat the intent behind Section 100.53. Under a power-level definition of “full,” a DBS provider could satisfy its Section 100.53 obligations merely by transmitting multiple channels of test patterns (albeit at full power) to Hawaii and Alaska! Such a result clearly was not the intent of the Commission in promulgating Section 100.53, and would undercut the underlying public interest finding.

A programming package that consists of marginal, niche programming does not satisfy the geographic service requirement of Section 100.53. Hawaii and Alaska are entitled to the same “core-CONUS” programming that subscribers on the mainland U.S. receive. The programming package offered Hawaii and Alaska need not be identical to that offered to every other CONUS location, but it must be of equal value. The Commission should, therefore, incorporate “equal value” programming into the geographic service requirements of Section 100.53. In addition, the “equal value” programming afforded to Hawaii and Alaska must be at prices equivalent to those charged in the CONUS.

---

<sup>19</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712, 9761 (1995) (emphasis added). See also Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, 11 FCC Rcd 1297, 1324 (1995) (Geographic service rules are needed because in their absence “Alaska and Hawaii will not be adequately served.”) (emphasis added).

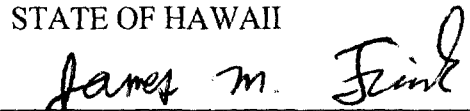
## VII. CONCLUSION

The State strongly supports the intent behind paragraphs 32-36 of the Commission's Notice. Clarifications and modifications of Section 100.53 are badly needed to expedite DBS service to Hawaii, which still lacks any DBS service. The Commission should incorporate into its proposals the five recommendations made by the State, namely: (1) Expand the scope of Section 100.53's geographic service obligations beyond DBS operators to include other forms of MVPD satellite providers; (2) Clarify that Section 100.53(b) applies to the replacement of any DBS satellite; (3) Do not delete Section 100.53(a), but instead clarify that it requires DBS licensees to provide full DBS service to Hawaii and Alaska from their western orbital slots by the end of the milestone period; (4) Adopt an "offshore states" policy; and (5) Clarify that "full" DBS service means DBS programming of equal value and at equivalent prices.

Respectfully submitted,

STATE OF HAWAII

By:



Herbert E. Marks

James M. Fink

SQUIRE, SANDERS & DEMPSEY, L.L.P.

1201 Pennsylvania Ave., N.W.

P.O. Box 407

Washington, D.C. 20044

(202) 626-6600

Its Attorneys

Kathryn Matayoshi  
Director  
Department of Commerce &  
Consumer Affairs

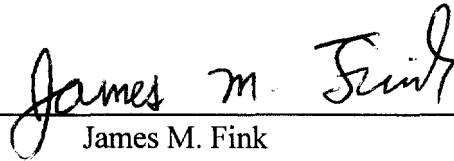
Clyde Sonobe  
Cable Administrator  
Cable Television Division

Sanford Inouye  
Staff Counsel  
Cable Television Division  
STATE OF HAWAII  
1010 Richards Street  
Honolulu, Hawaii 96813

April 6, 1998

## CERTIFICATE OF SERVICE

I, James M. Fink, do hereby certify that on this 6th day of April, 1998, I have caused a copy of the foregoing "Comments of the State of Hawaii" in IB Docket No. 98-21 to be served via hand delivery upon the persons listed below.

  
James M. Fink

Christopher J. Murphy  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 500  
Washington, DC 20554

International Transcription Services  
1231 20th Street, N.W.  
Washington, DC 20036